Supreme Court, U.S.
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No. 99-1907

In The

Supreme Court of the United States

BEHLES-GIDDENS, P.A., now known as
J.D. BEHLES & ASSOCIATES, P.C.,

Petitioner,

v.

ANGEL PROJECT I, LTD., and
UNITED STATES TRUSTEE,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATUTES INVOLVED

In addition to statutes cited by Petitioner, this case involves Bankruptcy Code, 11 U.S.C. § 327 set out below.

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the Trustee, with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the Trustee in carrying out the Trustee's duties under this title.

(b) If the Trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the Trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States Trustee, in which case the Court shall disapprove such employment if there is an actual conflict of interest.

(d) The Court may authorize the Trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The Trustee, with the Court's approval, may employ, for a specified special purpose, other than to represent the Trustee in conducting the case, an attorney

that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The Trustee may not employ a person that has served as an examiner in the case.

STATEMENT OF THE CASE

Respondent disagrees with the Petitioner's statement of the case and would point out that in addition to the sum of $535,507.05 awarded on the second, third, and fourth Fee Applications, the Court had already approved, on an interim basis, compensation of $179,473.79 which resulted in total compensation to Behles-Giddens of $714,980.79. By contrast, debtor's counsel, Daniel J. Behles was awarded $185,186.55 and the Chapter 11 Trustee was awarded $236,285.45. Thus, compensation for the Committee Counsel was three times greater than other professionals in the case even after the reduction from the $1,228,001.76 total of Fee Applications.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THIS PETITION

This case does not present a question in which a previously approved, defined compensation arrangement such as a fixed fee or contingent fee was reexamined by

the Court. Generally, the cases under § 328(a) involve special counsel employed for a specific purpose by the debtor or bankruptcy trustee, not debtors counsel or committee counsel. Occasionally, the fee is a contingent fee such as in *In re Confections by Sandra, Inc.*, 83 B.R. 729 (9th Cir. BAP 1987) in which the trustee had hired an attorney for the specific purpose of pursuing a fire loss claim. In the *National Gypsum Company* case, DLJ Securities Corporation had pre-approved compensation of $125,000.00 per month for its services. The Court ruled that if prior approval is given to a certain compensation, Section 328 controls and the Court starts with the approved compensation, modifying only for developments unforseen when originally approved. *In re National Gypsum Company*, 123 F.3d 861 (5th Cir. 1997). The cases cited by Petitioner involve contingent fees and an "earned upon receipt" retainer agreement.

The Amended Motion to Employ Counsel for the Property Owners' Committee is reproduced as Appendix A. The Order on Motion to Employ Counsel for the Unsecured Creditors' Committee is reproduced as Appendix B. The Motion attaches a Fee and Cost Schedule and provides for monthly billings and a method for partial payment subject to a separate Order of the Court allowing fees for the time period in question. The Order directed the filing of Fee Applications at least every 180 days. Neither the Motion nor the Order expressly refer to Section 328(a) nor do they approve any predetermined fee arrangement.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS PRESENTED BY THE FACTS OF THIS CASE

In the Courts below, Behles-Giddens was unsuccessful in convincing the Bankruptcy Judge, the District Judge, and the Tenth Circuit Court of Appeals that portions of its Fee Application were actual and necessary. Behles-Giddens seeks to avoid the Court's scrutiny of its Fee Application under § 330 and contends that the compensation may only be reduced pursuant to § 328(a) for " . . . developments not capable of being anticipated at the time and fixing of such terms and conditions." This position is not supported by case law outside of bankruptcy or in bankruptcy. Outside of bankruptcy, in New Mexico, an attorney employed on an hourly basis even at agreed hourly rates, has the burden of showing that the amount of time expended was reasonable and that the time was fairly and properly used. *Hinkle, Cox, et al. v. Cadle Company*, 115 N.M. 152, 848 P.2d 1079 N.M. (1993).

The Tenth Circuit holds that professional services are not "necessary" under § 330(a)(1), unless such services benefit the bankruptcy estate. *In re Lederman Enterprises, Inc.*, 997 F.2d 1321 (10th Cir. 1993). If the services did not benefit the estate, there is no need to inquire whether the charges for the services rendered were "reasonable." 997 F.2d at 1323.

The Tenth Circuit uses a two-pronged test. The first is an inquiry regarding benefit to estate. For the Application to be approved, Behles-Giddens was required to show its services benefitted the estate. Only after the Court is satisfied with the first prong may the Court move on to

the second prong and determine the reasonableness of the fees.

While the *Lederman* case concerned allowance of fees for the debtor's counsel, rather than for a § 1102 committee's counsel, the ruling was not limited to allowance of debtor's counsel fees. Rather, the *Lederman* holding applies to all attorneys and professional persons whose compensation is governed by § 330. Because § 330 clearly refers and applies to attorneys employed under § 1103, the *Lederman* standard applies to Behles-Giddens' fee applications.

The Tenth Circuit follows the majority rule. *See, e.g., In re Alcala*, 918 F.2d 99, 103 (9th Cir. 1990); *In re Reed*, 890 F.2d 104, 105-06 (8th Cir. 1989). The minority view is that benefit to the estate is not a threshold matter but is part of the test for reasonableness. *In re Coastal Nursing Center*, 162 B.R. 918 (Bankr. S.D. Ga. 1993). This case does not turn on this distinction.

III. THIS CASE DOES NOT HAVE FAR-REACHING BANKRUPTCY IMPLICATIONS

This case involves a Chapter 11 reorganization of a partially completed resort property in northern New Mexico known as the Angel Fire Resort. This proceeding was unusual because it had very few unsecured trade creditors. The committee that was finally appointed was referred to as the Property Owners' Committee. The Bankruptcy Court's opinion denied compensation for activities undertaken by the Committee which were not related to claims of creditors. For example, the Court denied compensation for activities related to the negative

easement litigation (Petitioner's Appendix D, page 27a) and an attempt to obtain standing in the estate of Sangre De Cristo IV which operated a hotel. Petitioner's Appendix D, page 25a. These issues are not typical of those found in the average Chapter 11 reorganization and may be limited to partially completed resort-type reorganizations.

Attorney fee issues tend to be fact intensive and context specific. The factors announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) are well settled. These factors are sometimes referred to as the "Lodestar" analysis and have been adopted in the Tenth Circuit in *First National Bank v. Niccum* (*In re Permian Anchor Services*), 649 F.2d 763, 768 (10th Cir. 1981). Reviewing Fee Applications is usually committed to the discretion of the reviewing judge and generally will not be reversed unless clearly erroneous. *Mares v. Credit Bureau of Raton*, 801 F.2d 1197 (10th Cir. 1986). The review does not involve a search for an exact fee and there is a range of reasonableness in all fee awards. *In re Casull*, 139 B.R. 525, 530 (Bankr. D. Colo. 1992).

Based upon the above factors, it is unlikely that this case would have far-reaching bankruptcy or other implications sufficient to warrant review by this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

WATROUS & REARDON
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APPENDIX A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

(Filed September 24, 1993)

No. 11-93-12176 MA

In Re:	)
Angel Fire Corporation Tax I.D. No. 85-0226843	)
Debtor.	)

AMENDED MOTION TO EMPLOY COUNSEL FOR THE PROPERTY OWNERS' COMMITTEE

COMES NOW The Property Owners' Committee and amends its motion to the Court for an Order employing the firm of BEHLES-GIDDENS, P.A., to represent the Property Owners' Committee ("Committee") in the above-referenced proceeding, and as grounds therefore states:

1. This motion has been amended to reflect that the Committee formed in this case is a Property Owners' Committee; the original motion filed on September 21, 1993 showed the Committee as the Unsecured Creditors' Committee.

2. Committee wishes to employ the firm of BEHLES-GIDDENS, P.A., attorneys duly admitted to practice in this Court, for the purpose of representing Committee in this Chapter 11 proceeding.

3. Committee has selected these attorneys for the reason that Committee believe that attorneys possess the skills and experience necessary to represent them.

4. The Committee desires to employ attorneys according to the terms and conditions shown on the fee and cost schedule attached hereto as Exhibit "A," which details the hourly rates for the attorneys who may participate in representation of the Committee.

5. The attorneys for the Committee may bill the estate for costs and attorneys' fees monthly; however, all sums paid from the Committee shall be applied only as follows: (1) The attorneys for the Committee may apply the funds received in payment of the bill to 75% of the fees and 75% of the tax on a monthly basis and to 100% of the costs. (2) The balance of the payment for the billing shall be held by the attorney for the Committee in its trust account, and shall be applied to the billings only upon separate order of this Court allowing the fees for the time period in question.

6. Employment of attorneys would be in the best interest of the Estate and should therefore be approved.

7. The office of the U.S. Trustee has been contacted for concurrence in this Motion and Trustee has approved the motion.

Respectfully submitted:

BEHLES-GIDDENS, P.A.
Attorneys for UCC

/s/_____

P. O. Box 849
Albuquerque, NM 87103
(505) 243-9756
(505) 243-7262 (fax no.)

I hereby certify that a true copy of the foregoing was mailed to:

U.S. Trustee
P.O. Box 608
Albuquerque, NM 87103

this 24th day of September, 1993.

/s/_____

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"A"

BEHLES-GIDDENS, P.A.

HOURLY FEE SCHEDULE

Jennie Deden Behles	$185.00
George D. Giddens, Jr.	$155.00
Rebecca E. Wardlaw	$155.00
P. Diane Webb	$155.00
Jeanne A. Hamrick	$110.00
Steven Tal Young	$110.00
Jennifer L. Street	$110.00
Jeffrey D. Wallace	$110.00
Karen W. Howden	$110.00
Legal Assistants	$ 50.00

APPENDIX B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

(Filed September 30, 1993)

No. 11-93-12176 MA

In Re:	)
Angel Fire Corporation Tax I.D. No. 85-0226843	)
Debtor.	)

ORDER ON MOTION TO EMPLOY COUNSEL FOR THE UNSECURED CREDITORS' COMMITTEE

THIS MATTER having come before the Court on Motion to Employ Counsel for the Property Owners' Committee, filed herein on September 21, 1993, and the Amended Motion filed subsequently, and the Court being satisfied that said law firm, Behles-Giddens, P.A., represents no interest adverse to Debtor or the Estate in the matters upon which it is to be employed, their employment is approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Estate is allowed to pay seventy-five percent (75%) of all attorney's fees, as well as one hundred percent (100%) costs and expenses, on a monthly basis, upon receipt by Debtor of statements rendered. The balance of the payment for the billings shall be applied to the billings upon separate Order of this Court allowing

the Attorney's Fee Applications, which Fee Applications will be filed at least every 180 days.

/s/ _____
MARK B. MCFEELEY
BANKRUPTCY COURT JUDGE